[2019] PBRA 49

the Parole Board
working with others to protect the public

Application for Reconsideration by Collis

Application

1. This is an application by Collis (the Applicant) for reconsideration of a decision by a Parole Board panel not to direct his release on the basis that the decision was both procedurally unfair and irrational.

2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases on either or both those bases.

Background

3. Between 1992 and 2008 the Applicant, committed 8 offences of indecent assault on 5 females under 14 and two offences of making an indecent photograph or pseudo-photograph of a child. On 10th June 2011 he was sentenced to a total sentence of 8 years 9 months. He was released on licence in 2016 but recalled in October of that year. He was again released on licence in June 2018 but recalled in October of the same year. His sentence will expire in April 2020. On 13th August 2019 a 3-member panel sat to consider his case. It declined to direct his release in a decision dated 19th August 2019.

The Relevant Law

4. In **R (on the application of DSD and others)-v-the Parole Board [2018] EWHC 694 (Admin),** the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It said at para 116 '*the issue is whether the release decision was so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'.* This test had first been set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374.** The Divisional Court in **DSD** went on to indicate that in deciding whether a decision of the Parole Board was irrational, due deference had to be given to the expertise of the Parole Board in making decisions relating to parole. The Board, when considering whether or not to direct a reconsideration, will adopt the same high standard for establishing 'irrationality'. The fact that Rule 28 uses the same word as is used in judicial review demonstrates that the same test should be applied. The Applicant has referred in his grounds to the well-known cases of **Associated Picture Houses v Wednesbury Corporation**

[1948] 1 KB 229, R v Ministry of defence, *ex parte* Smith [1996] QB 517 and the decision of the House of Lords in **R v Secretary of State for the Home Department *ex parte Daly* [2001] UKHL 26.**

5. There are a great number of cases in which the principles of procedural irregularity have been considered. The most often quoted passage is from the speech of Lord Diplock in the CCSU case quoted above – *"a …..failure to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred."* Cases in which the accused in criminal cases or the party to quasi-criminal proceedings like the present are represented by a lawyer are highly unlikely to generate a successful appeal if there had been no challenge made to the alleged irregularity by the applicant, save in the event for instance of a failure by the other party – in this case the Secretary of State – to disclose material relevant to the ultimate decision to the applicant or the tribunal. In this case the Applicant, a former doctor, chose to represent himself.

Request for reconsideration

6. The application is dated August 2019. The grounds are voluminous. They allege that the decision of the Parole Board is defective in that it is 'procedurally unfair, dysproportionate*(sic)*, and ….irrational' because of 'significant defect of process and its wrong consideration of information and risk…..' There are 30 numbered grounds and 3 additional unnumbered ones.

7. The unnumbered grounds in summary are:

   i. The decision letter contains no reference to the representations of the Applicant set out at pp 93-106, 252-260, & 279-80 of the dossier.
   ii. Despite his 'disability', the Applicant was not provided with an appropriate adult or other support.
   iii. The Applicant was not informed that the hearing was to be recorded.

8. The numbered grounds in summary are:

   i. The Panel Chair exerted undue pressure on the Applicant by informing him of the time set down for the hearing and existence of a second case listed that afternoon.
   ii. The Applicant informed the panel that his lack of legal representation was due to his inability to find it, not a wish not to be represented.
   iii. The Panel Chair unreasonably refused the Applicant's submissions as to the order of witnesses. In the result the hearing overran, and the Applicant was unable to put his submissions as to how his risk could be managed in future properly.
   iv. The Panel misunderstood the Applicant's case at trial regarding the offences of making indecent photographs. This caused the panel to draw an unjustified inference concerning the Applicant's risk.
   v. The phrase "43 charges from 9 complainants" on page 2 of the Decision Letter (DL) when referring to the index offences was

inaccurate and must have operated unfairly and to the detriment of the Applicant's case.

vi. The decision letter wrongly records that the Applicant had not made any admission of guilt or liability to the panel. The Applicant submits that he had accepted responsibility for causing harm to the victims and that the Panel's failure to reflect this in the DL was procedurally irregular.

vii. The statement on page 2 of the DL that two of the complainants were male was inaccurate. The error was corrected at page 4 of the DL.

viii. The statement in the DL to the effect that the Applicant in 2019 still had 'a sexual interest in pre-pubescent girls' and that he continued to have a pre-occupation with children' was wholly inaccurate bearing in mind the dates of the index offences.

ix. The panel wrongly used the diagnosis of 'Autism Spectrum Condition' as a risk factor and failed to understand or to adopt the Offender Manager (OM)'s report on this issue.

x. The Risk Management Plan was defective.

xi. The Panel Chair was hostile and overtly rude, consistently confrontational and discourteous and failed to take proper account of the Applicant's disability.

xii. The panel failed to understand the evidence of the Applicant's 'victim empathy', and the Applicant's alleged decisions to flout the terms of his licence conditions. The Applicant had at all times complied, as he believed, with those conditions, and when misunderstandings had arisen, he adapted his behaviour accordingly.

xiii. The panel failed to identify 'protective factors'. In fact, there were a number. In particular the Applicant's continuing denial of any sexual motive to the offences or his other behaviour relating to young children/images. There is clear evidence that "denial" is in fact a "protective factor".

xiv. The panel wrongly concluded that the Applicant had deliberately failed to co-operate with efforts to manage his risk. Responsibility for the extent to which steps to manage his risk had failed or not been embarked upon lay with others, not the Applicant.

xv. The panel misunderstood such researches as the Applicant had conducted into a victim of the index offence. A second 'warning' concerning use of the internet post-dated the decision to institute the recall procedure and therefore was not relevant to the panel's decision on the appropriateness of the recall.

xvi. The Panel acted irrationally in considering the possibility that the Applicant's testing of software had any relevance to its findings.

xvii. The panel misdescribed the presence of certain images as being 'on a computer' when they were not. There was no evidence that such images as were recovered post-dated the Applicant's conviction. The Panel should have confined its consideration to the evidence in the E-Safe Report, and that created in connexion with the previous recall.

xviii. A panel member behaved improperly when saying that he would interrupt the Applicant when he had got the answer to the question he had asked. His behaviour may have led to misunderstandings due

to the Applicant's tendency to interpret everything said to him literally.

xix. There may have been a misunderstanding as to the significance if any of drugs found in a bag belonging to the Applicant. The conclusion of the Panel that his evidence on this topic indicated an "uncompromising attitude to external controls" was unfair/irrational.

xx. The Panel was wrong to accept the OM's opinion that the Applicant had been "manipulative and evasive" when under supervision.

xxi. The findings relating to the possibility of there being offending behaviour work in custody were irrational since the only viable option for the Applicant would be 1-1 work in the community.

xxii. Although the OM stated that the Applicant had not 'paid heed to her warnings about your use of the internet', the Applicant's notes of the hearing indicate that the Applicant had continually asked for Guidance.

xxiii. The Panel came to a *('Wednesbury')* irrational conclusion concerning the existence or not of protective factors.

xxiv. The Panel's conclusions that the proposed risk management plan addressed the risks posed by the applicant, and that it was not robust enough to manage him in the community were inconsistent and therefore irrational.

xxv. The Applicant's concession in evidence concerning the extent, if any, of his access to a computer after release should not have influenced the Panel's ultimate decision not to direct it.

xxvi. The Panel's consideration of the Applicant's interest in accessing images and the possibilities of less intrusive ways of ensuring that his access to them did not represent a risk of serious harm to those or others who might be depicted in them was defective. That fact, allied to the Applicant's denial of sexual motivation in accessing them and the resulting reduction of his risk as a result, led the panel to an irrational decision.

xxvii. The panel was wrong to conclude that the Applicant had not fully complied with the measures imposed as part of his licence. The Applicant had given careful evidence on the topic and the Decision letter' failure to refer to it renders this finding irrational.

xxviii. The Panel's conclusion that the Applicant had 'fully understood the expectations' of his licence ignored the clear evidence that until 17th October 2018 the Applicant's understanding of his conditions was significantly different to that of his OM.

xxix. The Panel's finding that the current Risk Management Plan would not be effective was not something which should act to the detriment of the Applicant but should have provoked a request for a more effective one.

xxx. As a consequence of the above the OM Applicant and work out with him a new plan which takes into should be required to meet the account a number of factual errors within the OASys report. Thereafter a reconstituted panel should review the Applicant's case afresh.

9. The Applicant submits that some of his grounds are sufficient on their own to justify a reconsideration under one or both headings of irrationality or procedural irregularity but that taken together they make an overwhelming case for reconsideration.

Discussion

The grounds and the findings are set out below in tabular form

Grounds **Procedural Irregularity**	Summary of Ground	Discussion
Applicant grounds (unnumbered)	The decision letter contains no reference to the representations of the Applicant set out in the dossier.	It is correct that there is no reference to the Applicant's written submissions in the Decision Letter. It might have been helpful had there been such a reference. However, it was clear from the way in which panel members asked questions during the hearing that all had read the dossier thoroughly and reference was made to particular parts of the Applicant's written submissions on many occasions by the panel members in their questions both of the Applicant and other witnesses. There is no procedural requirement to set out in any judgment or Decision Letter the exact contents of the papers considered by a tribunal. The Panel Chair checked that the Applicant had the same bundle as the panel at the beginning of the hearing.
Applicant grounds (unnumbered)	Despite his disability, the Applicant was not provided with an appropriate adult or other support.	The Applicant made no submissions at any time to the effect that he needed assistance in comprehending the hearing or in putting forward the points he wished to make in support of his application for release. It is clear from the dossier and the recording of the hearing that he is a highly intelligent man, that he understood everything that was put to him, and that his participation at the hearing was not impaired in any way by his Aspergers/autism.

i) Applicant grounds (unnumbered)	The Applicant was not informed that the hearing was to be recorded.	The ground is factually correct. The Applicant should have been told that the hearing was to be recorded and he was not. It is however important to note that not every procedural irregularity will result in a finding of procedural irregularity, sufficient to trigger a Reconsideration or Judicial Review, in particular if the Applicant has not shown any way in which it has disadvantaged him. The Applicant has not advanced any ground to suggest that he would have conducted himself differently had he known that the hearing was to be recorded. The fact of the recording has enabled the record to be checked for accuracy and has, e.g. concerning this Ground, enabled the correctness of the Applicant's contention to be verified.
Numbered Applicant grounds (i)	The Panel Chair exerted undue pressure on the Applicant by informing him of the time set down for the hearing and the existence of a second case listed that afternoon.	The hearing lasted some two- and three-quarter hours. It concerned essentially two issues. First, the circumstances of the recall which had led to the need for the hearing, and second, an assessment of the risk posed by the Applicant for the next eight months or so were he to be released. The Investigator was questioned for some 37 minutes, the Applicant for about 55 minutes, the OM for 25 minutes and the OS for 35 minutes. The Applicant addressed the Panel for some 5 minutes at the end of the hearing and declined the opportunity to say more when asked.
Numbered Applicant grounds (ii)	The Applicant informed the panel that his lack of legal representation was due to his inability to fund it, not a wish not to be represented.	The reasons for the Applicant's decision not to be legally represented at the hearing have no bearing on the procedure adopted by the panel. Prisoners frequently choose not to be represented. The issues were comparatively simple to state and were explained to, and clearly understood by the Applicant. This was not the first hearing the

		Applicant had attended, and the issues were similar.
Numbered Applicant grounds (iii)	The Panel Chair unreasonably refused the Applicant's submissions as to the order of witnesses. In the result the hearing overran, and the Applicant was unable to put his submissions as to how his risk could be managed in future properly.	It is ultimately for the panel, as for any tribunal or court, to decide the order of witnesses. When, as in this case, the panel decides to ask the offender questions before hearing from the OS and OM, it is incumbent on the panel to give the offender the chance to come back on any points which had emerged during the evidence of witnesses who followed him. The Applicant was afforded such an opportunity at the conclusion of the hearing.
Numbered Applicant grounds (xi)	The Panel Chair was hostile and overtly rude, consistently confrontational and discourteous and failed to take proper account of the Applicant's disability.	There is nothing in this ground. Throughout the hearing, the limited part which the Chair took in the questioning (some 30 minutes in total) was entirely proper both in tone and content. The same is true of her preliminary and closing remarks.
Numbered Applicant grounds (xviii)	A panel member behaved improperly when saying that he would interrupt the Applicant when he had got the answer to the question he had asked. His behaviour may have led to misunderstandings due to the Applicant's tendency to interpret everything said to him literally.	These words or words like them are used by Judges daily in every kind of court or tribunal. There is nothing in this ground. The Applicant has not instanced any example of how the need to confine himself to answering the question disadvantaged him in any way.

10. **Irrationality**

Applicants grounds unnumbered (i)	The decision letter contains no reference to the representations of the Applicant set out in the relevant pages of the dossier.	It is correct that there is no reference to the Applicant's written submissions in the Decision Letter. It might have been helpful had there been such a reference. However, it was clear from the way in which panel members asked questions during the hearing that all had read the dossier thoroughly and reference was made to particular parts of the Applicant's written submissions on many occasions by the panel members in

		their questions both of the Applicant and other witnesses.
Applicants grounds numbered (iv)	The Panel misunderstood the Applicant's case at trial regarding the offences of making indecent photographs. This caused the panel to draw an unjustified inference concerning the Applicant's risk.	The way in which the Applicant had chosen to defend himself at trial was clearly understood by the panel. In short he admitted the actions which constituted the offences and, in retrospect, the harm that he had done to his victims. He denied, and maintains his denial, that those actions were sexually motivated.
Applicants grounds numbered (v)	The phrase "43 charges from 9 complainants" on page 2 of the Decision Letter when referring to the index offences was inaccurate and must have operated unfairly and to the detriment of the Applicant's case.	The phrase complained of was taken from an earlier Parole Board Decision Letter in 2017 which directed release. The Board was entitled to assume in the absence of contrary evidence that it was accurate. There is no evidence in the dossier concerning the detail of matters before the GMC in 2007, or any suggestion in the Decision Letter that the GMC findings had any bearing on the ultimate decision.
Applicants grounds numbered (vii)	The statement on page 2 of the Decision Letter that two of the complainants were male was inaccurate. The error was corrected at page 4 of the Decision Letter.	The question regarding the gender of victims of whether there had been male children depicted in the images – also containing females – of which the Applicant had been convicted at trial, had little or nothing to do with the question which the panel had to answer concerning the risk posed by the Applicant. The OM had seen the images in question and was sure that both male and female children were shown in them. (OASys p211). The panel was entitled to accept that evidence.
Applicants grounds numbered (viii)	The statement in the Decision Letter to the effect that the Applicant in 2019 still had 'a sexual interest in pre-pubescent girls' and that he continued to have a pre-occupation with children' was wholly inaccurate bearing in mind the dates of the index	The panel was entitled to reject the Applicant's evidence that the searches which had prompted his first recall and the most recent recall were the result of the sexual interest described in the Decision Letter.

	offences.	
Applicants grounds numbered (ix)	The panel wrongly used the diagnosis of 'Autism Spectrum Condition' as a risk factor and failed to understand or to adopt the Offender Manager's report on this issue.	The Decision Letter's finding in the last sentence of the 3rd paragraph of identifying three ways in which the Applicant's condition represented a risk factor cannot be criticised as irrational. The panel was entitled to disagree with the Offender Manager – who was in any event opposing release.
Applicants grounds numbered (x)	The Risk Management Plan (RMP) was defective.	Any alleged defects in the RMP cannot affect the rationality of the panel's decision that release should not be ordered. The panel was entitled to conclude as it did that there were no additional licence conditions which could mitigate the risk posed by the Applicant.
Applicants grounds numbered (xii)	The panel failed to understand the evidence of the Applicant's 'victim empathy', and the Applicant's alleged decisions to flout the terms of his licence conditions. The Applicant had at all times complied, as he believed, with those conditions, and when misunderstandings had arisen, he had adapted his behaviour accordingly.	This ground contains two elements. As to the first. The panel was entitled to consider that the Applicant's understanding of the harm he had done was intellectual but had not, bearing in mind his subsequent behaviours and licence breaches, significantly the risk he still posed. As to the second. The panel was entitled to conclude that the licence breaches had not been the result of misunderstandings on the Applicant's part.
Applicants grounds numbered (xiii)	The panel failed to identify 'protective factors'. In fact, there were a number. In particular the Applicant's continuing denial of any sexual motive to the offences or his other behaviour relating to young children/images. There is clear evidence that "denial" is in fact a "protective factor".	While denial may, in some circumstances be a protective factor, the question for the panel was whether they, together with the proposed additional conditions, were sufficient to manage the risk posed by the Applicant.
Applicants grounds numbered (xiv)	The panel wrongly implied that the Applicant had deliberately failed to co-operate with efforts to manage his risk.	The question for the panel concerned the existence and extent of the risk posed by the Applicant at the time of the hearing not the adequacy or inadequacy of efforts

	Responsibility for the extent to which steps to manage his risk had failed or not been embarked upon lay with others, not the Applicant.	made to reduce it thus far. The question of whether that risk might have been reduced by different means could not affect the rationality of the ultimate decision.
Applicants grounds numbered (xv)	The panel misunderstood such researches as the Applicant had conducted into a victim of the index offence. A second 'warning' concerning use of the internet post-dated the decision to institute the recall procedure and therefore was not relevant to the panel's decision on the appropriateness of the recall.	The panel rejected the Applicant's explanation. It was entitled to do so against the background of the index offences and the previous licence breach in 2017. The panel's decision on the correctness of the recall clearly did not turn on the question of the "second warning" incident. In any event, even if a recall – initially unjustified has not been activated by the time a further breach of the licence has been committed – no court or tribunal considering a prisoner's release, would order the release on the basis that the earlier release had not been justified.
Applicants grounds numbered (xvi)	The Panel acted irrationally in considering the possibility that the Applicant's testing of software had any relevance to its findings.	The panel accepted the Offender Manager's opinion that the Applicant was not simply "testing" software but trying to access material of the kind he had accessed in the past. That finding was not irrational albeit it was contested by the Applicant.
Applicants grounds numbered (xvii)	The panel misdescribed the presence of certain images as being 'on a computer' when they were not. There was no evidence that such images as were recovered post-dated the Applicant's conviction. The Panel should have confined its consideration to the evidence in the E-Safe Report, and that created in connection with the previous recall.	The examination of the circumstances surrounding the previous recall was necessary although of course only to the extent that it might assist the panel to make the correct decision at the hearing. It is clear from the DL that the E-safe Report was an important factor in the Panel's mind. The Offender Manager and Offender Supervisor had different views on the question of whether use of e-Safe following a new decision to release would or would not reduce the Applicant's risk to an acceptable level. The panel might have preferred the Offender Supervisors' view but in the end preferred that of the Offender Manager. Their

		decision to do so cannot be described as irrational,
Applicants grounds numbered (xix)	There may have been a misunderstanding as to the significance if any of drugs found in a bag belonging to the Applicant. The conclusion of the Panel that his evidence on this topic indicated an "uncompromising attitude to external controls" was unfair/irrational.	This issue was discussed fully at the oral hearing. The panel's comment was not irrational based on the Applicant's previous employment as a doctor and in any event clearly had little bearing on the ultimate decision which focused on concerns about the risk to children.
Applicants grounds numbered (xx)	The Panel was wrong to accept the Offender Manager's opinion that the Applicant had been "manipulative and evasive" when under supervision.	Panels are entitled to accept or reject evidence placed before them. There was nothing irrational about their decision to accept the Offender Manager's evidence.
Applicants grounds numbered (xxi)	The findings relating to the possibility of there being offending behaviour work in custody were irrational since the only viable option for the Applicant would be 1-1 work in the community.	That was not the conclusion of the Offender Manager who was of the opinion that there was such work available and that the Applicant would be unlikely to comply with such work in the community. The panel was entitled to conclude that that was the case.
Applicants grounds numbered (xxii)	Although the Offender Manager stated that the Applicant had not 'paid heed to warnings about use of the internet', the Applicant's notes of the hearing indicate that the Applicant had continually asked for Guidance.	The fact that the Applicant may have asked for guidance is not inconsistent with a finding that he had 'not paid heed to the Offender Manager's warnings.
Applicants grounds numbered (xxiii)	The Panel came to a *('Wednesbury')* irrational conclusion concerning the existence or not of protective factors.	This is effectively a repeat of Ground 13. The fact is that the panel was entitled to conclude there was a distinct absence of protective factors such as family etc
Applicants grounds numbered (xxiv)	The Panel's conclusions that the proposed Risk Management Plan (RMP) addressed the risks posed by the Applicant, and that it was not robust enough to manage him in the community were inconsistent and therefore	There is nothing irrational about a finding that an RMP addresses risks but cannot reduce them sufficiently to allow release.

	irrational.	
Applicants grounds numbered (xxv)	The Applicant's concession in evidence concerning the extent, if any, of his access to a computer after release should not have influenced the Panel's ultimate decision not to direct it.	Clearly the concerns which have led to the Applicant's recall from licence stemmed in the main not from contact offending by the use of computers to access illegal images and thereby 'revictimize' children depicted in them. The panel was entitled to conclude that the Applicant's previous behaviour meant that that risk still persisted.
Applicants grounds numbered (xxvi)	The Panel's consideration of the Applicant's interest in accessing images and the possibilities of less intrusive ways of ensuring that his access to them did not represent a risk of serious harm to those or others who might be depicted in them was defective. That fact, allied to the Applicant's denial of sexual motivation in accessing them and the resulting reduction of his risk as a result, led the panel to an irrational decision.	The ground does not specify in what way the panels' consideration was 'defective'. The Ground seems simply to allege that it should not have found as it did. The remainder of the Ground seeks to draw together some of the matters referred to earlier to ask that they be considered in the round against the irrationality test. Each of the contested findings was open to the panel on the evidence before it. Considered together it is not possible to make an arguable case on 'irrational'.
Applicants grounds numbered (xxvii)	The panel was wrong to conclude that the Applicant had not fully complied with the measures imposed as part of his licence. The Applicant had given careful evidence on the topic and the Decision letter's failure to refer to it renders this finding irrational.	This ground alleges an irrational finding concerning the recall gave rise to the hearing. The circumstances of the recall were considered carefully during the hearing, including the Applicant's case on the matter. In the Decision Letter (pp3 & 4 and 6) the panel concluded that the material discovered was sufficient to justify recall even though a decision has not yet been made on the question of prosecution. It was clearly a difficult question for the panel. The possibility that it might have come to a different conclusion cannot make its conclusion 'irrational'.
Applicants grounds numbered (xviii)	The Panel's conclusion that the Applicant had 'fully understood the expectations' of his licence ignored the clear evidence	The panel had made it clear during the hearing that it took the view, that by time the recall was instituted the Applicant understood his licence conditions sufficiently to

	that until 17 October 2018, the Applicant's understanding of his licence conditions was significantly different to that of his Offender Manager.	realise that his actions immediately prior to the alleged breach would constitute a breach of them. There may be some force in the submission that the word 'fully' may have overstated the position. However, the fact that, if that was the case the Applicant chose to experiment on his own rather than seeking advice, left it open to the panel to find as it did.
Applicants grounds numbered (xxix)	The Panel's finding that the current Risk Management Plan would not be effective was not something which should act to the detriment of the Applicant but should have provoked a request for a more effective one.	The panel was faced with an offender who, in its opinion, a. Had the intellectual ability to understand, and did understand, the terms of his licence – and the terms of the Sexual Offences Prevention Order, and b. Had already been 'extremely negligent'/ 'at best very careless' (p123 of the dossier) when first recalled and in the light of that previous recall had now committed what it found to have been a deliberate breach of his licence. In those circumstances it was open to it to decide as it did.
Applicants grounds numbered (xxx)	As a consequence of the above the OM should be required to meet the Applicant and work out with him a new plan which takes into account a number of factual errors within the OASys report. Thereafter a reconstituted panel should review the Applicant's case afresh.	This is not a separate ground to 29 above.

11. While it is easy to understand the disappointment of the Applicant at the decision, and it is possible that a different panel might have come to a different decision, it is impossible to characterise the decision letter, its reasoning and conclusions as 'irrational' within the definition set out above. Accordingly, the application for reconsideration is refused.

Sir David Calvert-Smith
05 November 2019

3rd Floor, 10 South Colonnade, London E14 4PU
www.gov.uk/government/organisations/parole-board
info@paroleboard.gov.uk
@Parole_Board
0203 880 0885